

PUBLIC CONTRACTS REVIEW BOARD

Case No. 595

CT 4042/2010

Tender for the Excavation of an Underground Tunnel from St Andrew's to Maghtab.

The tender was published on the 25th January 2011. The closing date was the 17th March 2011.

The estimated value of the Tender was €14,915.254 (Exclusive of VAT).

Six Bidders (6) had submitted an offer.

This case has been appointed for hearing following a decision given by the Court of Appeal, Appell Civili Numru 43/2011, on the 29th November 2012

On the 23rd January 2013, Messrs. Rockcut Limited, filed an objection against the rejection of their bid as being administratively non-compliant..

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 24th September 2013 to discuss the appeal.

Present for the hearing:

Rockcut Limited - Appellant

Mr Rhys Buttigieg	Representative
Architect Cleaven Maniscalco	Representative
Architect Emmanuel Zammit	Representative
Dr Albert Libreri	Legal Representative

Polidano Bros Limited - Preferred Bidder

Mr Noel Vella	Representative
Dr Franco Galea	Legal Representative
Dr Jean Paul Sammut	Legal Representative

Enemalta Corporation - Contracting Authority

Engineer Ivan Bonello	Chairman Evaluation Board
Engineer Mark Sciberras	Member Evaluation Board
Architect Mario Scicluna	Member Evaluation Board
Architect Gail Woods	Member Evaluation Board
Dr Steven Decesare	Legal Representative

Department of Contracts

Mr Nicholas Aquilina	Procurement Manager
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The Chairman made a brief introduction and explained that this case was sent back by the Court of Appeal following the declaration by the Public Contracts Review Board had found that the letter of objection was filed after the lapse of the legal time. He continued that as far as the Board was aware, the tender in question had been awarded and the contract concluded. The appellant's representative was then asked to make his submissions on the objection.

Dr Albert Libreri on behalf of the appellant company explained that the Court of Appeal decided that the legal time would start from the time the second notice of disqualification was sent to the appellant, and not from the first notice, as the Public Contracts Review Board had decided. The law precludes appellant from having recourse to a warrant of prohibitional injunction against the Director of Contracts to keep him from signing a contract because there are remedial damages. He insisted that the Board should now decide the merits of the objection notwithstanding the fact that the tender has been awarded. He claimed that appellant's bid was cheaper.

Dr Steven Decesare on behalf of the Contracting Authority said that Enemalta does not know what appellant's financial offer was. This was a three package tender and the appellant's bid had been disqualified as non-compliant at the first, the administrative, stage. Appellant's financial package was not opened. Appellant's offer was not compliant because the satisfactory execution certificates, as requested, were not submitted. In the letter of objection, this omission was admitted by the appellant.

Dr Franco Galea on behalf of the recommended bidder stated that the present Board had to decide if the appellant was right in filing the objection or not. To see if the evaluation board were correct when disqualifying appellant's bid. The law allows the tender procedure to continue immediately after the decision of the PCR. The remedy available to appellant would then be to seek damages.

Dr Albert Libreri stated that Enemalta had issued a clarification note, on the 18th February 2011, whereby the former Clause 6 of the tender document was replaced by Clauses 6.1, 6.11, and 6.12. This sub-clause 6.12 is further divided into five sub-clauses and in the third of these, (c) states that “*evidence of relevant experience in execution of works of a similar nature over the past 5 years (Form 4.10), including the nature and value of the relevant contracts*”..... When the tender document is examined, however it can be seen that this Form 4.10 has nothing to do with experience, instead Form 4.10 deals exclusively with personnel information. This shows that the Clarification contained erroneous information. Appellants, on receiving the clarification noticed that the only form in the tender documents that resembled it was Form 4.9. This form 4.9 that was completed by appellant, shows a column for experience as contractor, another to show the value of the contract; the date and the place and stage of completion of the works; the name of the contractor and satisfaction of completion. Dr Libreri contends that this form therefore supplied the information requested in the Clarification. It can be seen from appellant's filled in form 4.9, that in four cases it cited in the form were for works contracted by the contracting authority in the present tender, that is Enemalta. The contracting authority had also reserved the right, by the clarification, to contact any of the bidder's clients with a view to obtain from them an opinion on the works provided to them by the tenderer. Seeing that Enemalta itself was the client of appellant firm it could easily have supplied the information whether the previous works were satisfactory or not. To recapitulate, Dr Libreri said that the Form 4.10 mentioned in the Clarification was erroneous, and that appellant filled in and submitted Form 4.9 which provided the required information, and thus appellant's bid was administratively compliant. Furthermore if the

evaluation board did not fully understand the submitted Form 4.9, it should have asked for a clarification. This would not have been rectification but a clarification, and is allowed.

Dr Albert Libreri continued that nine days after the submission of the present tender, appellant had filed another bid for another identical tender with the same contracting authority, Enemalta, wherein the same mistake in mixing Form 4.9 and form 4.10 had been repeated. However in that tender, Enemalta had sought clarification from the present appellant, and asked for certificates. His client, the present appellant had been awarded that tender. He contended that the error in form 4.10 rendered the tender ambiguous, and his client's bid should not have been discarded.

Dr Steven Decesare on behalf of the contracting authority said that a Clarification was issued in this tender, and part of the clarification relevant to this case was 6.1.2 (c). There were three requisites arising from this sub-clause. The first was that bidder was to provide evidence of experience, this was provided by appellant and there are no problems. The second one was to provide certificates that works were carried out in a satisfactory manner. The third required that the value of the works to amount €3,000,000. Appellant's bid satisfied the first and the third requirement, but the second requirement did not. The bid did not include any certification from bidder's clients as requested. The evaluation board has to adjudicate on the submitted documents. The fact that the same contracting authority was listed by appellant in his submission has no relevance, as members of the evaluation board do not necessarily form part of Enemalta. The reference made to another tender is also irrelevant to this case. The fact remains that appellant failed to submit the required certificates, and this is admitted by the appellant firm itself in the letter of objection. Dr Decesare continued that Clause 10.3 of the instructions to tenderers states that all the requested documents must be submitted, and all such documents must comply explicitly with these provisions. This point has been accepted by the Public Contracts Review Board several times before and he mentioned several instances where this was done. He specifically referred to Case 238 where the merit was exactly the same as the present. Mandatory documents that were not submitted could not be requested through clarification as this would amount to rectification.

Dr Albert Libreri explained that appellants thought that once Form 4.9 was submitted, their offer provided all the requisites and was compliant. The missing information was after all just for references, and it was taken for granted that the contracting authority would check with the list of clients submitted in form 4.9, itself. This was not an omission that entailed disqualification as it would not be proportional to do so. He cited a European Court of Justice decision wherein it held that where there is an obvious error in a bid, it was disproportionate and unlawful not to seek clarification, and permit a correction. To fail to provide a certificate issued from the contracting authority itself was totally not proportional action in a €8,000,000 tender. After all, the works provided to Enemalta by the appellant before had all been completed to the satisfaction of the contracting authority.

Dr Franco Galea on behalf of the preferred bidder said that tender conditions were there for all, and the same for each bidder. The conditions clearly required the submission of the certificates in question. A bidder could not decide to ignore these conditions and fail to submit them. Any request from the evaluation board would not have been a clarification but a rectification. Appellant failed to submit any certificates not just those from the contracting authority itself. He explained that the clarification stated that the contracting authority reserved the right ask for satisfaction by the bidders' clients and not certification.

Dr Steven Decesare for the contracting authority said that it is not true that once form 4.9 was

filled, the tender conditions were adhered to. All conditions had to be satisfied. The Tideland case regarded a form filled up with a typing error, where it could be clearly seen that such an error was made. In this case all the other bidders filled in the correct form and provided the requested certificates. This Board had previously decided that where there was an admission of an omission by the objector, was enough to disqualify his bid. The fact that Enemalta reserved the right to contact bidders' clients did not mean that it was going to ask them to provide the certificates itself, and it was a right that was reserved and not an obligation. There is an EU directive that states that you cannot ask for non submitted documents.

Dr Albert Libreri reiterated that another tender, issued nine days after the present one, and having the same evaluation board, is relevant and not irrelevant. One questions why the same evaluation board chose to ask for clarifications in one case and not in the present one.

The hearing was here brought to a close.

This Board,

Having taken into consideration the Court of Appeals ruling dated 29th November 2012 and also through the Appellant's verbal submission during the hearing held on the 24th September 2013.

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 23rd January 2013, had objected to the decision taken by the pertinent authority, in that:

- a) The Appellant contends that the Public Contracts Review Board should now decide on the merits of the case, although the tender in question has already been awarded.**
- b) The Appellant's bid was cheaper than that of the awarded bidder.**
- c) The missing information, being claimed as such by the contracting Authority, was in fact submitted by the Appellant via form 4.9 of the tender document.**
- d) The Appellant confirmed that the only missing documentation was the certification of works carried out over the last 5 years.**
- e) Since the information was given by the Appellant relating to previous experience and satisfactorily completion of same, the Contracting Authority had every opportunity to verify such required experience of the Appellant's performance over the required period.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 24th September 2013, in that:

- a) Since this tender was a 'Three package tender', the Evaluation Board could not be aware of the Appellant's bid price.**
- b) The mandatory requirement of the 'Satisfactory Execution of Previous Contracts Certification' of works carried out had not been submitted by the Appellant.**

- c) **The Appellant's bid satisfied only the first and third requisite of sub clause 6.1.2(c).**
- d) **The fact that the Appellant submitted a list of a previous works carried out which included the Contacting Authority itself does not justify the failure for non submission of the relevant certifications as required in the conditions of the tender document.**

Reached the following conclusions:

- 1. **This Board opines that the certifications required in the tender document were mandatory requirements.**
- 2. **The Appellant was aware of the requirement to submit all documentation as specified in the tender document.**
- 3. **It was the onus of the tenderer to submit all relevant information as requested in the tender document and not for the Evaluation Board to seek confirmation of the listed contract of works carried out by the Appellant.**
- 4. **The Evaluation Board's duties are to:**
 - I. **Ensure that all documentation is received and is in accordance with the specified requirements as stipulated in the conditions of the tender document.**
 - II. **Confirm that the documentation is administratively compliant. In this case, this Board opines that the decision taken by the Evaluation Board to deem the Appellant's offer as being 'Administratively non compliant' was justified.**
 - III. **The Evaluation Board should not act as Auditors but as Evaluators. In this regard, the same Board were not in duty bound to seek additional information which was missing from the tender documentation and which was mandatory obligation on the Appellant's part to submit.**
- 5. **This Board noted that it was not the first time that the Appellant tendered for such projects and the Appellant was fully aware that all requested documentation in a tender document should be submitted. Especially when one takes into account the magnitude of the tender under appeal.**

In view of the above, this Board finds against the Appellant Company however, this same Board recommends that the deposit paid by the Appellant should be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

5 November 2013